Ho Kam Phaw v Fam Sin Nin

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-322 OF 1997
MAHADEV SHANKAR, MOKHTAR SIDIN AND DENIS ONG JJCA
30 JULY 1997

***Contract** — Formation — Terms — Agreement to dissolve partnership — Amended terms faxed to appellant — Whether fax was an unqualified offer which the respondent could accept — Whether there was a binding contract between both parties*

The appellant and the respondent were the partners of a firm of solicitors. Certain differences arose between the parties and as a result of that, they decided to terminate the partnership. Both parties agreed to dissolve the partnership with effect from 15 March 1996 and acted upon an agreement to this effect. Though the partnership had been dissolved, there were certain assets retained by the respondent which were to be divided and settled between the parties. Negotiations were carried out between the parties but they could not come to a settlement. The respondent through his solicitors forwarded a draft of the amended cl 3 to the original draft settlement ('the unseen draft agreement') to the appellant. This draft was not tendered as evidence to both the court below and this court although it was referred to in the correspondence between the parties. The respondent requested the appellant and his solicitors to liaise with Mr Max Yong of Messrs Kiru & Yong — the respondent's conveyancing solicitors — to finalize changes to the draft agreement. The appellant later forwarded four sets of the deed of settlement duly executed by the appellant ('draft No 2') but the respondent returned the four sets unexecuted stating that the respondent had not agreed to the changes. The respondent further stated that any changes proposed by the appellant ought to be referred to and discussed with Mr Max Yong. On 8 July 1996, the appellant received a facsimile copy of the deed of settlement from Messrs Kiru & Yong ('the faxed draft'). On 9 July 1996, the appellant executed photostat copies of the faxed draft and forwarded the same to the respondent's solicitors. It was contended by the appellant that the faxed draft constituted the final draft of the deed of settlement and the appellant signed it to confirm that he agreed to the terms of the settlement. On the other hand, the respondent submitted that the facsimile was a mere proposal and he has not agreed to the terms as contained in the facsimiles. The trial judge found that all the terms had not been agreed, and therefore Max's faxed draft could not amount to an offer capable of acceptance. The appellant appealed. The issue before the court was whether the fax sent by Max Yong constituted an unqualified offer from the respondent's authorized agent, which the appellant was at liberty to accept so that an enforceable contract would immediately have come into being without any further formality.

Held, dismissing the appeal:

(1) (Per **Mahadev Shankar JCA**) Even if the appellant's solicitor had proven that the faxed draft was in every respect identical to the unseen draft agreement, and all the terms had been agreed upon, there was still no concluded contract here because the respondent had not signed it. Moreover, the respondent's solicitor had refuted the appellant's solicitor's overtures immediately after he was given notice of what the appellant's solicitor was attempting to do (see p 721B–C); *Heller Factoring Sdn Bhd v Metalco Industries (M) Sdn Bhd* [1995] 2 MLJ 153 distinguished.

(2) (Per **Denis Ong JCA**) On the available evidence, neither the appellant nor the respondent had established their respective cases on the balance of probabilities. Without the unseen draft agreement made available to the court, it was impossible for the court to arrive at a finding of fact that the faxed draft was or was not an exact copy of the unseen draft agreement or that those amendments were or were not amendments and if they were, whether they were the respondent's amendments.

The only possible inference of fact that could reasonably be drawn concerning the faxed draft was that it was an offer by the appellant's solicitors on the appellant's behalf to the respondent's solicitors for the respondent to settle on the terms of the faxed draft and no more. The respondent did not accept the appellant's offer and did not sign the faxed draft. Thus, there was no contract binding on the appellant or the respondent (see pp 734I and 735A–C).

(3) (Per **Mokhtar Sidin JCA**, dissenting) There was already a concluded agreement by 9 July 1996 when the appellant's solicitors sent the signed faxed draft. The respondent, instead of raising issues on the draft agreement itself, raised other matters not within the ambit of the agreement to reject the agreement. It was clear that they could not raise any issue on any clause of the agreement because they had already agreed on it. The issue of bank accounts raised was already provided for in the agreement. If it was provided in the agreement, then it was not a matter to be dealt with separately.

Once the appellant accepted the draft as agreed by the parties when he signed the photostat copies of the faxed draft without any amendment, the appellant had accepted the agreed unseen draft agreement. Therefore, as on 9 July 1996, there was an already concluded agreement. As such, the appellant was entitled to the declaration he was seeking (see p 726A–D).

[Bahasa Malaysia summary

Perayu dan penentang adalah pekongsi sebuah firma peguamcara. Perbezaan-perbezaan telah timbul di antara pihak-pihak dan akibatnya, mereka memutuskan untuk menamatkan perkongsian. Kedua-dua

A pihak bersetuju membubarkan perkongsian mulai dari 15 Mac 1996 dan bertindak atas perjanjian yang membayangkan hasrat ini. Walaupun perkongsian telah dibubarkan, aset tertentu telah dikekalkan oleh penentang yang hendaklah dibahagikan dan diselesaikan di antara pihak-pihak. Perundingan telah diadakan di antara pihak-pihak tetapi mereka tidak dapat mencapai persetujuan. Penentang melalui peguamcaranya telah menghantar suatu draf fasal 3 terpinda penyelesaian draf yang asal ('penyelesaian draf yang tidak dilihat') kepada perayu. Draf tidak dikemukakan sebagai bukti kepada kedua-dua mahkamah bawah dan mahkamah ini walaupun ia dirujuk dalam surat-menyurat di antara pihak-pihak. Penentang meminta perayu dan peguamcaranya supaya berhubung dengan En Max Yong dari Tetuan Kiru & Yong — peguamcara pemindahhakan penentang — untuk memuktamadkan pindaan kepada perjanjian draf. Perayu kemudiannya menghantar empat set suratikatan penyelesaian yang dilaksanakan seperti yang sepatutnya oleh perayu ('draf No 2') tetapi penentang telah memulangkan keempat-empat set tanpa menyempurnakannya dengan menyatakan bahawa penentang tidak bersetuju dengan pindaan-pindaan. Penentang selanjutnya menyatakan bahawa sebarang pindaan yang dicadangkan oleh perayu sepatutnya dirujuk dan dibincang dengan En Max Yong. Pada 8 Julai 1996, perayu telah menerima sesalinan faksimile suratikatan penyelesaian daripada Tetuan Kiru & Yong ('draf yang difakskan'). Pada 9 Julai 1996, perayu menyempurnakan salinan fotostat draf yang difakskan dan menghantar yang sama kepada peguamcara penentang. Ia dihujahkan oleh perayu bahawa draft yang difakskan membentuk draf terakhir suratikatan penyelesaian dan perayu telah menandatanganinya untuk mengesahkan bahawa dia bersetuju kepada terma penyelesaian. Sebaliknya, penentang berhujah bahawa faksimile tersebut cumalah suatu cadangan dan dia belum lagi bersetuju kepada terma seperti yang termaktub dalam faksimile-faksimile. Hakim perbicaraan mendapati bahawa ksemua terma tidak disetujui, dan maka draf Max yang difakskan tidak terjumlah kepada suatu tawaran yang boleh diterima. Perayu membuat rayuan. Isu di hadapan mahkamah adalah sama ada faks yang dihantar oleh Max Yong membentuk suatu tawaran tanpa syarat daripada ejen penentang yang diberi kuasa, yang mana perayu bebas menerima supaya suatu kontrak yang boleh dikuatkuasakan wujud dengan segera tanpa formaliti lanjut.

Diputuskan, menolak rayuan:

(1) (Oleh **Mahadev Shankar HMR**) Sekalipun peguamcara perayu membuktikan bahawa draf yang difakskan adalah dalam setiap aspek serupa dengan perjanjian draf yang tidak dilihat, dan kesemua terma telah disetujui, masih tidak terdapat kontrak yang dicapai di sini kerana penentang tidak menandatanganinya. Tambahan pula, peguamcara penentang telah menyangkal percubaan peguamcara perayu dengan serta merta selepas

diberikan notis tentang apa yang cuba dilakukan oleh peguamcara perayu (lihat ms 721B–C); *Heller Factoring Sdn Bhd v Metalco Industries (M) Sdn Bhd* [1995] 2 MLJ 153 dibeza.

(2) (Oleh **Denis Ong HMR**) Atas keterangan yang ada, kedua-dua perayu mahupun penentang gagal membuktikan kes mereka masing-masing atas imbangan kebarangkalian. Tanpa perjanjian draf yang tidak dilihat tersebut disediakan kepada mahkamah, adalah mustahil untuk mahkamah mencapai keputusan fakta bahawa draf yang difakskan adalah atau bukanlah salinan sah draf perjanjian yang tidak dilihat atau bahawa pindaan-pindaan itu adalah atau bukanlah pindaan dan andainya begitu, sama ada mereka adalah pindaan penentang.

Satu-satunya inferens fakta yang mungkin boleh dibuat mengenai draf yang difakskan adalah bahawa ia merupakan satu tawaran oleh peguamcara perayu bagi pihak perayu kepada peguamcara penentang untuk menyelesai atas terma draf dan tidak lebih daripada itu. Penentang tidak menerima tawaran perayu dan tidak menandatangani draf yang difakskan. Justeru itu, tiada kontrak yang mengikat perayu atau penentang (lihat ms 734I dan 735A–C).

(3) (Oleh **Mokhtar Sidin HMR**, menentang) Sudah pun terdapat perjanjian yang dicapai pada 9 Julai 1996 apabila peguamcara perayu menghantar draf yang difakskan yang ditandatangani. Penentang telah membangkitkan hal lain yang bukan dalam lingkungan perjanjian dan bukannya isu atas draf perjanjian sendiri untuk menolak perjanjian tersebut. Adalah jelas bahawa mereka tidak boleh membangkitkan sebarang isu tentang mana-mana fasal perjanjian tersebut kerana mereka telah pun bersetuju atasnya. Isu akaun bank yang dibangkitkan sudah pun diperuntukkan dalam perjanjian tersebut. Andainya ia diperuntukkan dalam perjanjian tersebut, maka ia bukanlah suatu hal untuk diuruskan secara berasingan.

Sebaik sahaja perayu menerima draf seperti yang disetujui oleh pihak-pihak apabila ia menandatangani salinan fotostat draf yang difakskan tanpa sebarang pindaan, perayu telah menerima draf perjanjian yang tidak dilihat tersebut. Maka, pada 9 Julai 1996, sudah pun terdapat suatu perjanjian yang dicapai. Oleh yang demikian, perayu berhak mendapat perisytiharan yang dipohonnya (lihat ms 726A–D).]

Notes

For a case on terms in formation of contract, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) para 1596.

Cases referred to

Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd [1994] 2 MLJ 754 (refd)

British Russian Gazette & Trade Outlook Ltd v Associated Newspapers Ltd [1933] 2 KB 616 (refd)
Carruthers v Whitaker [1975] 2 NZLR 667 (refd)
Concorde Enterprises Ltd v Motors (Anthony) (Hutt) Ltd [1981] 2 NZLR 385 (refd)
Grace Shipping Inc & Anor v CF Sharp & Co (Malaya) Pte Ltd [1987] 1 MLJ 257 (refd)
Heller Factoring Sdn Bhd v Metalco Industries (M) Sdn Bhd [1995] 2 MLJ 153 (distd)
Lau Sieng Nguong v Hap Shing Co Ltd [1969] 1 MLJ 190 (refd)
Shell Oil v Wordcom Investments [1992] 1 NZLR 129 (refd)

Legislation referred to

Partnership Act 1961 ss 41, 46
Rules of the High Court 1980 O 30
Solicitors Accounts (Deposit Interest) Rules 1990

Appeal from: Civil Suit No D2–22–682 of 1996 (High Court, Kuala Lumpur)

MS Murthi (*CK Cham* with him) (*Murthi & Partners*) for the appellant.
Joseph Yeo (*AJ Ariffin Yeo & Harpal*) for the respondent.

Mahadev Shankar JCA: Since we have a division here it is desirable that I should give my own reasons why I decided that this appeal should be dismissed.

First of all, I would place upon record my appreciation for the excellent judgment of Abdul Aziz J in the court below, which as far as I am concerned, is beyond reproach.

The crux of this case is whether the fax sent by Max Yong on 8 July 1996 constituted an unqualified 'offer' (in its strict legal sense) from the respondent's ('Fam') authorized agent, which the appellant ('Ho') was at liberty to 'accept' so that an enforceable contract would immediately have come into being without any further formality.

Murthi & Partners ('Murthi') were Ho's duly authorized solicitors for concluding the contract. Fam's was RR Sethu. Between them was a third firm Messrs Kiru & Yong ('Max') whose only role was to draft the formal agreement which was to be executed by Ho and Fam.

The evidence leaves it open for the inference that Max was a neutral party who was in that sense not holding a brief for Ho or Fam. As Sethu's letter to Murthi dated 27 June 1996 shows, Max was also being instructed by Ho's wife on what the contract should contain. Sethu was not involved in the drafting at all.

The facts found by the trial judge and the evidence led establish conclusively that when Ho and Fam instructed their respective solicitors, each of them had in mind that their differences would be resolved by a formal agreement in writing to be drafted by Max, which was to be

approved by each of their solicitors, and that Ho and Fam each intended to contract with the other by a document which each of them will be required to sign. In such a situation, nothing short of signing the document by both parties could bring a contract into existence.

In such circumstances, the rule is that:

> ... even although the terms to be included in the documents have been agreed, there is no contract and each party has a *locus poenitentiae* until at least execution on both sides.

These concepts are not new. Reference can be made to the standard text books as well as *Carruthers v Whitaker* [1975] 2 NZLR 667, and *Concorde Enterprises Ltd v Motors (Anthony) (Hutt) Ltd* [1981] 2 NZLR 385, as well as *Shell Oil v Wordcom Investments* [1992] 1 NZLR 129.

Therefore, in all the circumstances of this case, my view is that even if as Murthi contends, all the terms had been agreed, there is no contract here because Fam did not sign.

The trial judge found that all the terms had not been agreed, and therefore Max's fax could not amount to an offer capable of acceptance. With this I entirely agree.

The manner in which Ho's solicitors proceeded calls for comment, as the following sequence of events shows.

The 'unseen draft' was handed by Fam to Ho personally on or about 17 June 1996. There was a disagreement about the clause relating to service. The draft went back to Max. He amended cl 3 of the unseen draft to cover service. On 24 June 1996, Sethu wrote to Murthi enclosing the amendment. Paragraph 3 of this letter confirms that both Ho and Fam were to sign the agreement. Murthi's reply letter of 27 June 1996 reconfirmed that. He proposed minor changes to the 'unseen draft' with the amended cl 3.

Sethu replied on 27 June 1996 to Murthi referring him to Max. The legal implication of this overture is that even if Sethu's letter of 24 June 1996 could be considered an offer, it was rejected by Murthi on 27 June 1996 by a counter offer whose terms were yet to be identified.

A cursory reading of Murthi's letter dated 29 June 1996 suggests that only a minor amendment had been made in the deed of settlement he enclosed for execution by Fam. It had already been executed by Ho. The alleged minor amendment was that any notice of change of address must also be sent by prepaid registered post.

If Murthi means to be taken seriously and he really believed that this deed of settlement was otherwise identical to the 'unseen draft', it is curious that he did not go so far as to submit that a contract had come into existence on 29 June 1996 as soon as Ho signed it.

In fact, the proposed amendment, however minor, made Murthi's letter of 29 June 1996 a counter offer.

Chitty on Contracts Vol 1 (26th Ed) para 77 is significant:

A *Method must generally be complied with.* An offer which requires the acceptance to be expressed or communicated in a certain way can generally be accepted only in that way. Thus if the offeror asks for the acceptance to be sent to a particular place, one sent elsewhere will not bind him: *Frank v Knight* (1937) OPD 113; *Eliason v Henshaw* (1819) 4 Wheat 225; *Walker v Glass* [1979] NI 129; nor will he be bound by an oral acceptance if he has asked B for it to be expressed in writing: *Financings Ltd v Stimson* [1962] 1 WLR 1184. This rule is particularly strict where the offer is contained in an option: *Holwell Securities Ltd v Hughes* [1974] 1 WLR 157.

That Murthi departed from the agreed mode of procedure in two respects is clear from Sethu's letter dated 2 July 1996:

C (i) substantial changes were made to the 'unseen draft';

(ii) Murthi had not sent his document to Max who alone was to put up the draft, and then submit it to each party for approval.

So even if the 'unseen draft' could be treated as an offer, it was a spent force by 29 June 1996. In the meantime, the situation on the ground has D changed as regards the bank account and the other matters raised by Sethu's letter of 2 July 1996. In fact, performance of the unseen draft terms was no longer possible. Sethu said so in his letter:

> Without any previous notice to our client, and contrary to the *basis of the negotiations* for the settlement of this matter, your client had written a letter E to the firm's banks in relation to both the office and client's accounts that cheques drawn on either account ought not to be honoured without specific confirmation from your client. The bank has informed our client that all cheques drawn on either account would be dishonoured and that the remark endorsed would be 'Refer to drawer'.
>
> F We trust that your client appreciates the consequences of the dishonour of a cheques drawn on a solicitors' account especially the trust account. Your client would have to bear the consequences for claims by clients of their funds in clients' account as well as to the other consequences that flow from the dishonour of the client's account cheques. The bank has even refused to issue a new cheque book. Since dissolution, our client had produced every cheque, on either account, to your client for signature of verification.
>
> G The initial payment of RM50,000 was to have come from the funds in the office account of the firm, which was to be taken by our client. With the suspension of the accounts, this is not now possible.
>
> In the circumstances, our client feels that the road to an amicable settlement is slim as the events narrated above clearly bear out. We have H instructions to produce these correspondence before his Lordship at the next hearing by an affidavit.
>
> Unless this matter is solved amicably, on the terms originally agreed, we have advised our client to request the Bar Council to take over the operation of the client's account as our client does not want to be answerable to his clients for the monies in the client's account. (Emphasis added.)

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I discount any suggestion that this last paragraph meant that Sethu had dispensed with the 'basis of the negotiation for the settlement of the matter' and that there was now an offer for acceptance on the terms of the unseen

draft. New matters had come to surface which had to be taken into account. 'The terms originally agreed' is a misnomer because the 'unseen draft' was not agreed. The 'matter' to be solved amicably therefore included the matters raised in the previous paragraphs. The proper meaning is that the 'unseen draft' was to be used mutatis mutandis as the basis for the fresh agreement.

Sethu had sent Murthi's deed of aettlement to Max Yong on 2 July 1996 not by way of acceptance but 'for his comment'.

Murthi's response by letter dated 5 July 1996 was that apart from the minor amendment as to change of address, the deed sent on 29 June 1996 was the same as the 'unseen draft'.

The next step is the faxed draft sent by Max to Murthi on 8 July 1996. Murthi says this was a formal offer capable of acceptance. What he says he did was to photostat the faxes and get Ho to sign this by way of acceptance so that without further ado, a contract came into existence.

This argument has two facets:

(i) First it is contended that the mere communication by Max of this fax was an offer authorized by Fam.

(ii) Second it is contended that because it is identical to the 'unseen draft', it constituted the 'offer' referred to in the last paragraph of Sethu's letter of 2 July 1996, as being the terms 'originally agreed'.

Both submissions are suspect. Murthi knew his draft had been sent to Max by Sethu for comment only. Max's fax on 8 July 1996 did not say anything about Fam having agreed to these terms. So this was Max's refinement of the draft Murthi sent on 29 June 1996. Max did not send a similar fax to Sethu. Fam had not signed the faxed draft. If Fam had agreed to all the terms and it was intended to be the final copy, Max should have got Fam to sign the proper engrossed documents before sending them to Murthi for execution by Ho. Murthi's act in photostating the fax and claiming it was the document intended for final execution was unorthodox. It was also a departure from standard conveyancing practice. Most of all, it was not the specified way in which Sethu required the acceptance to be communicated.

As to the second contention, if in fact the faxed draft was identical to the original 'unseen draft', why did Murthi not produce it in court to support his case? We find this omission on his part quite astonishing. It calls for an application of s 114(g) of the Evidence Act 1950.

I now want to refer to Sethu's letter to Murthi dated 16 July 1996. The second paragraph reads:

> As to the first, second and third paragraphs of your letter, our client denies that he unilaterally made major changes. Whatever changes from the original draft were all agreed to between your client and our client. It was on this basis that Mr Max Yong drafted the amended version. In particular, cl 9 of the copy of the agreement that was faxed by Kiru & Yong (on 8 July 1996) and signed by your client, provides for instalment payment of the RM20,000 *whereas in what you had forwarded the part relating to instalment payment had been deleted.* This is just one instance. (Emphasis added.)

This is an assertion that the deed of settlement signed by Ho and sent by Murthi to Sethu on 29 June 1996 was not an exact copy of the fax sent by Max. Murthi contended otherwise. Murthi contends that the deed of settlement of 29 June 1996 and the faxed draft of 8 July 1996 were both exact copies of the 'unseen draft'. If so, the deed and the faxed draft should be same. They are not (compare cl 9 in appeal record at p 128 and at p 136).

This is a strange case but, as I stated earlier, the bottom line is that even if Murthi had satisfied me that the faxed draft of 8 July 1996 was in every respect identical to the 'unseen draft', it is my firm opinion that there was no concluded contract here because Fam had not signed it. *Heller Factoring Sdn Bhd v Metalco Industries (M) Sdn Bhd* [1995] 2 MLJ 153 can give the appellant no support. That decision was based on acquiescence and part performance. Here Sethu refuted Murthi's overtures immediately after he was given notice of what Murthi was attempting to do.

I have read the judgment of my brother judge Mokhtar Sidin JCA with great interest. It eloquently says everything that could possibly be urged for the other point of view but with all due respect I am afraid it has not left me with any lingering doubts that this appeal deserved to be dismissed with costs.

Mokhtar Sidin JCA: This is an appeal by the appellant against the decision of the learned judge of the High Court who has dismissed an application by the appellant for a declaration that the settlement agreement between the parties had been concluded. The appellant is also seeking for a declaration that by virtue of that settlement, the respondent is liable to pay to the appellant certain sums of money due to him under that settlement. The learned senior assistant registrar has ordered that the question whether there has been a concluded settlement agreement be determined as an issue first which according to the learned judge will more or less determine the whole suit.

The facts of the case as found by the learned judge are as follows.

The appellant and the respondent were the only partners of a firm of solicitors. Certain differences arose between the parties and as a result of that, they decided to terminate the partnership. Both parties agreed to dissolve the partnership with effect from 15 March 1996. This was carried out and the partnership was dissolved effectively from 15 March 1996 and each party went their separate ways. Though the partnership had been dissolved, there are certain assets to be divided and settled between the parties. From the facts and the documents before the court, it appears to me that the assets had been retained by the respondent. Negotiations were carried out between the parties but they could not come to a settlement. As a result of that, the appellant then filed a writ for the declaration stated above.

It appears to me that there was an agreement which was acted upon by the parties to dissolve the partnership. The only issue left between the parties is the apportionment and division of the assets of the partnership which are in the possession of the respondent. To me the question of

dissolving the partnership is past and gone. It is not an issue anymore. The question to be determined as it appears is what happened to the assets of the partnership as a result of the agreement to dissolve. I have to point this out because the issue before us is the assets itself, vis-a-vis what is the entitlement of the parties to the assets of the partnership. It is in this light that I deal with this appeal.

Subsequent to the filing of the writ, on 24 June 1996 the respondent through his solicitors forwarded a draft of the amended cl 3 to the original draft settlement (which was never tendered as an exhibit by either party) which was described by the learned judge as an unseen draft. As a result of this, on 27 June 1996 the appellant and his solicitors sought to have a meeting with the respondent at the respondent's solicitors' office to finalize the agreement. Instead of agreeing to this request, the respondent through his solicitors requested the appellant and his solicitors to liaise with Mr Max Yong of Messrs Kiru & Yong to finalize changes to the draft agreement. From the evidence, it is not clear whether that meeting took place though the learned judge had concluded that the appellant did not take up the proposed changes with the drafting solicitors, that is Mr Max Yong. On 29 June 1996, the appellant forwarded four sets of the deed of settlement duly executed by the appellant and on 2 July 1996, the respondent returned the four sets unexecuted stating that the respondent had not agreed to the changes. The respondent further stated that any changes proposed by the appellant ought to be referred to and discussed with Mr Max Yong. On 8 July 1996, the appellant received a facsimile copy of the deed of settlement from Messrs Kiru & Yong. This is found at pp 133–137 of the record of appeal. It was stated on the facsimile that the time was 5.10pm on 8 July 1996. On the same day, the appellant's solicitors gave a reply by way of facsimile to the respondent's solicitors and a copy was sent to Messrs Kiru & Yong. The essence of that letter are as follows:

> We shall endeavour to persuade our client to accept the terms contained therein and deliver to you the executed copies of the agreement forthwith as we do not want to go back to the judge and annoy him.
>
> We will revert to you by 10am tomorrow.

On 9 July 1996 at about 9.15am, the appellant executed photostat copies of the facsimile copy of the deed of settlement sent to him by Messrs Kiru & Yong and forwarded the same to the defendant's solicitors. It was contended by the appellant that the copy of the deed of settlement received through the facsimile constituted the final draft of the deed of settlement and the appellant signed it to confirm that he agreed to the terms of the settlement. It was contended by the respondent that the facsimile was a mere proposal and he has not agreed to the terms as contained in the facsimiles. As such, he denied that there was a concluded agreement. On 10 July 1996, the respondent's solicitors wrote to the appellant's solicitors stating that the copies sent by Messrs Kiru & Yong differed from the copies which was returned to the appellant on 2 July 1996. It is to be noted that the copies returned to the appellant on 2 July 1996 are the four sets

of deeds executed by the appellant which were rejected by the respondent which was stated earlier.

The issue before the court is whether the photostat copies signed by the appellant constituted a concluded deed of settlement. The first objection by the respondent was that there is no concluded agreement because what was signed by the appellant and despatched to the respondent were only photostat copies from a facsimile copy which cannot be a concluded agreement. The appellant's solicitors submitted that the reasons for making photostat copies of the facsimile received by him was to ensure that they were not departing from the proposal sent by Messrs Kiru & Yong who, as admitted by the respondent, were the drafting solicitors. In that context, I am of the view that the appellant was right in making photostat copies of the facsimile and signed them to signify his acceptance of the terms in toto without any amendment. It must be borne in mind that before that, the appellant and his solicitors wanted to see the respondent's solicitors to iron out the disagreement on cl 3. The respondent and his solicitors requested the appellant to see Mr Max Yong of Messrs Kiru & Yong, the drafting solicitors for the respondent. The respondent made it an issue that the appellant and his solicitors did not go to see Mr Max Yong. There is no evidence or indication that the appellant or his solicitors went to see Mr Max Yong after that. Thus, the proposal through the facsimiles from Messrs Kiru & Yong, the drafting solicitors, which was not denied by the respondent, must surely have originated from the respondent. In my view, the facsimile is the proposal from the respondent and when the appellant signed and sent it to the respondent's solicitors, it is an acceptance by the appellant. It was suggested by the respondent that the facsimile was only a proposal. I agree that it was a proposal by the respondent conveyed by Messrs Kiru & Yong. It could not be a proposal from Messrs Kiru & Yong to both the appellant and the respondent because Messrs Kiru & Yong was not a party to the agreement. They were only drafting the agreement on behalf of the respondent. In my view, if a proposal is accepted without any amendment or counter proposal, then that proposal becomes a concluded agreement. It may be that photostat copies are not in normal cases a really formal agreement which is nicely typed out on paper but the issue here is whether there is a concluded agreement.

I have gone through the deed as contained in the facsimiles and the deed at pp 125–129, they are almost if not exactly the same except for cl 3 when there are variations. It must be borne in mind that the differences between the parties are in cl 3. It is significant to note that the appellant's solicitors by the letter dated 29 June 1996 to the respondent's solicitors (at p 124 of the record) inter alia stated as follows:

> We refer to the above matter and your letters dated 24 June 1996 and 27 June 1996.
>
> Our Major Murthi has had a discussion with our client and has advised our client to accept the said amended cl 3, with the minor amendment that the notice of change of address be also sent by prepaid registered post. This would be consistent with the notice of default in the preceding paragraph.

> In the circumstances, we are pleased to enclose herewith four (4) sets of the deed of settlement, duly executed by our client. Kindly have your client execute the same and return us the ORIGINAL and a copy each of the deed of settlement together with your client's cheque made out in our client's favour and the letter of instruction to the bank to appoint your client as sole signatory.

The respondent's solicitor's reply was dated 2 July 1996 (p 130 of the record) which, inter alia, stated as follows:

> We refer to your letter dated 29 June 1996 and copies of the agreement signed by your client. These are returned herewith because our client had not agreed to the changes. We had made it clear in our letter that any changes, proposed by your client ought to be referred to and discussed with Mr Max Yong of M/s Kiru & Yong first before we deal with them. This had not occurred.
>
> Further, the agreement contains changes other than as to the notice provision. In particular, what was previously agreed had been changed: instances are cl 7 (dealing with identity), cl 8i on the exercise of the option by our client of the right to purchase equipment under leasing; cl 8j; cl 9 as to the time and mode of payment of the books. Our client does not want these books; he only agreed to take them as your client did not want them; your client can take the whole lot and pay the value of RM20,000 to our client (subject to the problem on the present state of the bank accounts explained below). At our client's request, we have forwarded a copy of your draft (though signed by your client to Mr Max Yong for his comments).

The appellant's solicitors' reply to that letter was dated 5 July 1996. The contents, inter alia, stated as follows:

> Save for the minor amendment that the notice of change of address be sent by prepaid registered post, there are no changes to the draft agreement prepared by your client. Hence the changes which you alleged in your second paragraph therein is denied.
>
> Enclosed herewith is the draft agreement handed to my client by your client. Please compare the same with the documents that were sent to you on 1 July 1996 and satisfy yourself as to the accuracy of our statement.

There is no response to this letter either from the respondent or the respondent's solicitors. Though all the letters above contained some other matters in respect of the operation of the bank accounts of the partnership, I will deal with them later. After that, the draft of the deed of settlement as received through the fax by the appellant's solicitors.

As can be seen there were actually three drafts. The first is the draft received by the appellant which according to the learned judge was the draft of the agreement agreed on as at 24 June 1996 (which is referred by me as draft No 1). It is unfortunate that this draft was not made available in the record. On receiving this draft, the appellant's solicitors made amendments (according to the letter dated 29 June 1996, minor amendments) and the appellant's solicitors made fair copies where the appellant duly signed them and sent them back to the respondent's solicitors. I will refer to it as draft No 2. Then there is another draft received by the appellant by way of facsimile. I will refer to this as draft No 3.

A The learned judge made his findings on these three drafts as follows. He said:

> But what actually developed was a deviation from the expected flow of events. Three days later, on 8 July at 5.10pm, the drafting solicitor faxed a draft agreement to the plaintiff's solicitors. The draft is included in the
B bundle and I shall refer to it as 'the faxed draft'. No message accompanied the draft to explain the status of the draft or why the drafting solicitor faxed it to the plaintiff's solicitors.
>
> In submissions before me, however, learned counsel for the defendant said that it was the draft of the agreement that had been agreed on as at 24 June and learned counsel for the plaintiff said that the draft that was
C agreed on and in existence on 24 June was the draft handed by the defendant to the plaintiff a week earlier on 17 June. I take the faxed draft to be the draft that had been agreed on as at 24 June, which I have referred to as draft No 1, and that it was the same draft that the plaintiff's solicitors had enclosed in their letter of 5 July to the defendant's solicitors to be compared with draft No 2 to satisfy themselves that draft No 2 did not contain any
D changes as alleged by the defendant's solicitors.
>
> Comparing the faxed draft with draft No 2, I find that draft No 2 does include various changes.

My understanding of that passage is that draft No 1 is the same as draft No 3 (the faxed draft). Draft No 2 is the amended version by the appellant's
E solicitors which was despatched to the respondent's solicitors. In his letter dated 29 June 1996, the appellant's solicitors admitted there were amendments made to draft No 1 but he said it was minor. Whether the amendments were minor or not, in my opinion, does not matter anymore because that draft was rejected by the respondent's solicitors vide his letter dated 2 July. There was no counter proposal whatsoever except asking the
F appellant to refer to the drafting solicitors. This was despite the letter dated 5 July 1996 from the appellant's solicitors. To me, the respondent has rejected the amended draft (draft No 2) because there were no proposals to improve or to compromise draft No 2. In other words, it was an outright rejection of draft No 2. This is fortified by the fact that on 8 July 1996 the
G drafting solicitors faxed draft No 3. It is clear to me that this was not done at the request of the appellant because the appellant had already in his possession draft No 2, a copy was despatched to the respondent's solicitors. To me when draft No 3 was sent by fax to the appellant's solicitors, it was a reminder to the appellant that either he accepts that draft or there is no deal. Draft No 3 is the same as draft No 1 without any amendment. In my
H view, at that stage, the appellant and his solicitors knew that the respondent and his solicitors would not concede or entertain amendment to the agreed drafts which are draft No 1 and draft No 3. As a result of that, the appellant's solicitors made photostat copies of the fax and signed them. They did this as explained by the solicitors for the appellant to avoid any
I allegation of amending the agreed draft. My view may be different if there are differences between draft No 1 and draft No 3. This has been conceded by the respondent and found by the learned judge as clearly stated in the passage above. At that stage of time, draft No 2 is not an issue anymore and I believe the appellant had accepted this fact.

In my view, by 9 July 1996 when the appellant's solicitors sent that signed draft No 3, there was already a concluded agreement. The respondent in spite of this, by a letter dated 10 July 1996, sent the signed draft No 3 to the appellant. Now instead of raising issues on the draft agreement itself, the respondent's solicitors raised other matters not within the ambit of the agreement to reject the agreement. It is clear that they could not raise any issue on any clause of the agreement because they have already agreed on it. Now they are raising the issue of bank accounts which I believe is already provided for in the agreement. In my view, if it is provided in the agreement, then it is not a matter to be dealt with separately.

The issue before the court was whether from the evidence there was a concluded agreement. In my view, once the appellant accepted the draft as agreed by the parties when he signed the photostat copies of draft No 3 without any amendment, the appellant had accepted the agreed draft (draft No 1). For that reason, I am of the view that as on 9 July 1996, there was an already concluded agreement. The appellant is entitled to the declaration he is seeking.

For the above reasons I will allow this appeal with costs here and below.

Denis Ong JCA: This appeal was heard on 30 July 1997 at the conclusion of which by a majority decision (Mahadev Shankar and Denis Ong JJCA, Mokhtar Sidin JCA dissenting), we dismissed it with costs. It was also stated that the reasons would be given later and they are as follows:

The appellant ('Ho') and the respondent ('Fam') practised in partnership as advocates and solicitors since July 1990 under the firm name of M/s Ho & Fam. They agreed to the dissolution of the partnership and that such dissolution was effective from 15 March 1996 but were unable to agree upon the distribution of assets in the winding-up of the business and affairs of the partnership. On 13 May 1996, Ho applied by Originating Summons No D3–24–168–96 to the High Court for the appointment of an interim receiver and manager to wind up the partnership. Pending hearing of the originating summons, both sides were engaged in a negotiation through their solicitors namely, M/s Murthi & Partners for Ho and M/s RR Sethu for Fam to settle the matter amicably out of court. The procedure used in the negotiation was by way of a draft agreement of settlement, phone calls and letters exchanged by fax and otherwise between M/s RR Sethu and M/s Murthi & Partners concerning the terms of such draft agreement. The draft agreement was prepared by M/s Kiru & Yong, another firm of solicitors instructed by Fam as his conveyancing solicitor in addition to M/s RR Sethu who were engaged as Fam's litigation solicitor.

Arising from such exchanges, three documents which purported to have recorded their agreement in detail, were identified:

(a) the draft 'settlement agreement' ('the unseen draft agreement') not incorporated into the appeal record but mentioned in the letter dated 24 June 1996 from M/s RR Sethu to M/s Murthi & Partners and carbon copied to Fam the client;

(b) The deed of settlement at pp 125–129 of the appeal record ('draft No 2') mentioned in the letter dated 29 June 1996 from M/s Murthi & Partners to M/s RR Sethu which was carbon copied to Ho the client and to M/s Kiru & Yong; and

(c) The deed of settlement at pp 133–137 of the appeal record ('the faxed draft') mentioned in the letters dated 8 July 1996 and 9 July 1996 from M/s Murthi & Partners to M/s RR Sethu.

Ho claimed that on the principles of offer and acceptance, a contract was constituted which was legally binding on the parties. Fam denied the claim. Hence the present action by Ho for a declaration of court that the draft faxed by M/s Kiru & Yong to M/s Murthi & Partners on 8 July 1996 constituted a formal offer which was signed by Ho by way of acceptance and communicated by letter on 9 July 1996 to M/s RR Sethu and therefore, constituted a binding contract between the parties. In his defence, Fam maintained that Ho's action in transmitting signed copies of the faxed draft was no more than a mere proposal; that prior to 8 July 1996 both sides were engaged in negotiation to settle on the terms of the unseen draft agreement prepared by M/s Kiru & Yong but that no settlement was reached because of Ho's refusal to agree to certain terms therein. Ho then put up draft No 2 which was not agreed to by Fam. As a result of certain unilateral actions by Ho in the course of negotiation, Fam alleged that the firm's office and clients' accounts were frozen by the bank and no withdrawal was permitted. Fam further alleged that undisclosed to him, Ho received substantial sums of money from certain clients which Ho failed to invest in accordance with the Solicitors Accounts (Deposit Interest) Rules 1990 and that claims were made by those clients. Hence Fam counterclaimed against Ho for damages, indemnity, accounts, valuation of the works and an equal share in the residue of the partnership assets after settlement of all debts, liabilities and costs of winding up.

On Ho's application, the court below was asked to determine as a preliminary issue whether the faxed draft signed by Ho and communicated to M/s RR Sethu by letter dated 9 July 1997 constituted an agreement reached between the parties which was binding on them. For that purpose, M/s Murthi & Partners filed certain documents from pp 120–154 of the appeal record for the consideration of the court. On 6 June 1997, the court below held that there was no concluded agreement and dismissed the appellant's action with costs, including costs of determination of the preliminary issue.

The same question namely, whether a binding agreement was concluded on those documents, was argued here as in the court below. Mr Murthi made a three point submission:

(a) that the faxed draft was Fam's offer to settle because it incorporated Fam's proposed amendments to the unseen draft agreement;

(b) that Ho had already abandoned his draft No 2 when he accepted Fam's offer in the faxed draft and that an agreement was concluded by such offer and acceptance; and

(c) that by M/s RR Sethu's letter dated 10 July 1996 at p 141 of the appeal record, Fam attempted to renege from the agreement in the faxed draft.

Mr Murthi added that basically the court below misapprehended the facts and thereby erred in making a comparison between the faxed draft and draft No 2 which he said, was bound to show differences in the terms thereof. According to him, a relevant comparison would have been between the faxed draft and the unseen draft agreement.

Conceding that all drafting was to be done by Max Yong of M/s Kiru & Yong, Mr Joseph Yeo, learned counsel for Fam, submitted that the letters dated 8 July 1996 and 9 July 1996 from M/s Murthi & Partners to M/s RR Sethu at pp 138–140 respectively of the appeal record together with the faxed draft constituted an offer by Ho that the parties do go back to the terms originally agreed; that such offer was not accepted by Fam and consequently, there was no agreement concluded.

On the question of whether a binding agreement was concluded on a set of documents, the Federal Court in *Lau Sieng Nguong v Hap Shing Co Ltd* [1969] 1 MLJ 190 held that it was clear law that where a contract was to be deduced from a set of documents, it was necessary to look into the whole of the correspondence between the parties to see if the parties have come to a binding agreement. Lord Goff of Chieveley in *Grace Shipping Inc & Anor v CF Sharp & Co (Malaya) Pte Ltd* [1987] 1 MLJ 257 at p 259 right column D, writes:

> The question whether there was a concluded agreement in the telex messages depends entirely upon a detailed analysis of the telexes which passed between Sharp and Polfracht Sydney between 28 January and 5 February 1975.

In *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754, the Supreme Court held that the existence of an agreement depends upon the intention of the parties who must be ad idem and that such agreement may be inferred from the language they have used, their conduct, the object of the contract and its surrounding circumstances as a whole.

Ho's originating summons in Originating Summons No D3–24–168–96 formed no part of the appeal record. However, from a brief reference to its nature in para 4 of the statement of claim, ie 'for the appointment of interim receiver and manager over the assets of the dissolved partnership', it seemed that the application by way of originating summons was made under s 41 of the Partnership Act 1961 to wind up the business and affairs of the partnership firm as a follow up on the dissolution of the partnership and also under O 30 of the RHC 1980 for the appointment of an interim receiver and manager pending the winding-up by the court. If the originating summons had taken its course up to the hearing, the court below must give due regard to their rights as partners to the application of the partnership property on a dissolution of the partnership as declared in s 41 and to their obligations as partners under the rules laid down in s 46 to distribute the assets rateably, unless they agreed otherwise. From cll 11, 12 and 13 of the

faxed draft and draft No 2, it was clear that what the parties intended to achieve, by negotiation commenced on a 'without prejudice' basis, was a compromise by way of accord and satisfaction to have the assets and liabilities of the partnership distributed in specie instead of rateably which they were obliged to under the rules in s 46 and, by such accord and satisfaction, to settle Originating Summons No D3–24–168–96 amicably out of court.

Scrutton LJ in *British Russian Gazette & Trade Outlook Ltd v Associated Newspapers Ltd* [1933] 2 KB 616 at pp 643–644 defined accord and satisfaction thus:

> Accord and satisfaction is the purchase of a release from an obligation whether arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative.

Chitty on Contracts — General Principles (27th Ed) states at para 22–012, on compromise:

> ... In order to establish a valid compromise, it must be shown that there has been an agreement (accord) which is complete and certain in its terms, and that consideration (satisfaction) has been given or promised in return for the promised or actual forbearance to pursue the claim ... .

and at para 22–019, on evidence of accord:

> The question whether there has been an accord and satisfaction is a question of fact ... . The construction of any correspondence which, it is alleged, evidences the accord is, however, a question of law.

It was common ground that no agreement was reached between the parties of the unseen draft agreement or on draft No 2 and consequently no question of accord and satisfaction. Ho's claim was that there was a binding agreement on the faxed draft on 9 July 1996 when he accepted it. And in relation to cll 11 and 12 of the faxed draft, that claim could only have meant that there was accord and satisfaction which was binding on the parties.

The primary issue raised by submissions from both sides was whether the faxed draft was an offer by Fam. On this issue, the court below after a detailed examination and discussion of the letters exchanged between the parties from 24 June 1996 to 9 July 1996 gave a reasoned opinion at pp 98–99 of the appeal record that the faxed draft was not an offer. Before us, Mr Murthi argued that the faxed draft was a follow up of Fam's offer in para 7 of M/s RR Sethu's letter dated 2 July 1996 at p 130 of the appeal record because it incorporated Fam's proposed amendments to the unseen draft agreement. On the other hand, Mr Yeo argued that the faxed draft together with the letters dated 8 July 1996 and 9 July 1996 from M/s Murthi & Partners was an offer from Ho to Fam to revert back to the 'terms originally agreed' as stated in para 7 of M/s RR Sethu's letter dated 2 July 1996. It was plain that their first dispute arose from the penultimate paragraph of that letter and in particular as to what it meant.

Their second dispute was whether the faxed draft was the same as the unseen draft agreement or whether it was the unseen draft agreement to which Fam had incorporated his own proposed amendments. I shall deal with the disputes in that order.

M/s RR Sethu's letter dated 2 July 1996 was written in the context of a reply to M/s Murthi & Partner's letter dated 29 June 1996 in which the latter forwarded four copies of draft No 2 executed by Ho and attested by Mr Murthi. That letter gave the impression that draft No 2 incorporated all that was previously agreed with the sole exception of cl 3 which Ho had amended to provide for the requirement of prepaid registered post to apply in the case of a notice of change of address. It requested Fam's execution of draft No 2 and to return the original with Fam's cheque and Fam's letter of instruction to the bank to appoint Fam as the sole signatory.

M/s RR Sethu's letter dated 2 July 1996 complained that in addition to the amended cl 3, cll 7(ii), 8(i), (j) and 9, draft No 2 incorporated changes which did not have the previous approval of Fam. It further reiterated that any changes to the unseen draft agreement must first be referred to and discussed with Max Yong of M/s Kiru & Yong before M/s RR Sethu dealt with them which procedure had not been followed. In respect of the amended cl 9 of draft No 2, it informed that Fam agreed to take those books only because Ho did not want them and further that Ho could take them if he paid Fam RM20,000. It also alleged that Ho unilaterally wrote to the bank to dishonour cheques drawn on the firm's and clients' accounts and that the bank dishonoured such cheques and refused to issue a new cheque book and it warned Ho of the consequences of dishonour for which Ho alone was liable. As a result of the suspension of the firm's account, the initial payment of RM50,000 under the unseen draft agreement became impossible.

The concluding paragraphs of that letter read thus:

> In the circumstances, our client feels that the road to an amicable settlement is slim as the events narrated above clearly bear out. We have instructions to produce these correspondence before his Lordship at the next hearing by an affidavit.
>
> Unless this matter is solved amicably, on the terms originally agreed, we have advised our client to request the Bar Council to take over the operation of the client's account as our client does not want to be answerable to his clients for their monies in the client's account.

What was meant by the penultimate paragraph must be read in the context of that reply and the background circumstances to which that reply made references. Although not in the appeal record, it was a fact not disputed by either Ho or Fam that the unseen draft agreement preceded draft No 2. It was prepared by Max Yong of M/s Kiru & Yong, the conveyancing solicitor of Fam, and that amendments agreed up to 24 June 1996 as a result of negotiation between the parties were incorporated in it. Thus, the only reasonable inference of fact that could be drawn was that the unseen draft agreement was, in the first place, Fam's offer to settle the distribution of the assets and liabilities of the partnership upon its dissolution and to

A settle Originating Summons No D3–24–168–96. When draft No 2 prepared by M/s Murthi & Partners and signed by Ho was conveyed to M/s RR Sethu by letter dated 29 June 1996, the only reasonable inference of fact that could be drawn was that draft No 2 was the counter offer by Ho to settle on the terms therein — not just an offer as the court below thought that it was. By necessary implication, such counter offer must mean a rejection on 29 June 1996 of Fam's offer in the unseen draft agreement. By expressing that Fam had not agreed to the changes in draft No 2 and returning draft No 2 to M/s Murthi & Partners unsigned by Fam, the only reasonable inference of fact that could be drawn was that Fam rejected Ho's counter offer in draft No 2. From the unilateral actions of Ho in altering the unseen draft agreement and in writing to the bank without the consultation or approval of Fam in the course of 'without prejudice' negotiations to settle, it was evident from the sentiment expressed in the concluding paragraphs of that letter that Fam had little faith or confidence in continuing the negotiation or in its outcome and was more or less decided to go ahead with Originating Summons No D3–24–168–96 at its next hearing and had been advised to request the Bar Council to take over the operation of the clients' account. From the views and actions he indicated in the concluding paragraphs, it was clear that Fam was averse to Ho's counter offer of a settlement on the terms of draft No 2 and any negotiation based on it was out of the question. To all intents and purposes so far as Fam was concerned, negotiation on his offer of settlement on the terms of the unseen draft agreement ended on 29 June 1996 because of Ho's supervening counter offer in draft No 2. So far as Fam was concerned, negotiations would have to start afresh if there was to be an amicable settlement of Originating Summons No D3–24–168–96. The penultimate paragraph of the offer letter summed up Fam's position: in other words, if there was to be any amicable settlement of OS–D3–24–168–96, it had to be on the terms originally agreed — meaning that he was not averse to an amicable settlement but that the offer to settle must be on the terms originally agreed and that such offer must come from Ho; if there was no settlement, Fam had already been advised to request the Bar Council to take over the operation of the client's account. In my analysis, that was what the penultimate paragraph of M/s RR Sethu's letter dated 2 July 1996 meant.

On 5 July 1996, M/s Murthi & Partners replied to M/s RR Sethu's letter dated 2 July 1996 in which the former denied any changes in draft No 2 to the unseen draft agreement, clarified what Ho wrote to the bank in respect of the firm's account, why he wrote it and disclaimed any responsibility for the bank's action. In that reply, there was no indication whatsoever as to Ho's disposition whether to resume negotiation and whether he accepted Fam's condition in the penultimate paragraph of M/s RR Sethu's letter dated 2 July 1996, ie to settle on the terms originally agreed. In short, there was no response whatever on that score. By his denial of the changes, Ho must be taken to defend and reaffirm draft No 2. His omission to state this in his reply of 5 July 1996 could be interpreted in two ways. First, that he rejected Fam's condition that the matter be

settled on the terms originally agreed. Second, that he would keep his options open to settle on the original terms as there was no time frame set while waiting for Fam's instruction on draft No 2 which M/s Murthi & Partners had requested M/s RR Sethu to obtain and revert. To my mind, the second alternative was the better view. For three days, M/s Murthi & Partners waited but M/s RR Sethu did not revert. Then, on 8 July 1996, Max Yong of M/s Kiru & Yong faxed to M/s Murthi & Partners the faxed draft and on the same day, M/s Murthi & Partners faxed to M/s RR Sethu informing the latter that it had received the faxed draft from Max Yong and added that it would endeavour to persuade Ho to accept the terms therein, that it would deliver to the latter, executed copies of the faxed draft and lastly, that it would revert to the latter by 10am the next day. Indeed, the next day, ie 9 July 1996, it delivered by hand four copies of the faxed draft signed by Ho and witnessed by Mr Murthi for execution by Fam and the return to it of the original and a copy for its safekeeping as instructed by its covering letter of the same date. Here I come to consider the second dispute.

Basically, the second dispute raised a point of fact, that was to say, whether the faxed draft was the same as the unseen draft agreement or whether it was the unseen draft agreement to which Fam had incorporated his own proposed amendments. Before us, Mr Murthi pointed out that here was where the court below erred in misapprehending the facts namely, by comparing the faxed draft with draft No 2 and added that there were bound to be differences between the two drafts. Mr Yeo's stand was that the faxed draft was the same as the unseen draft agreement, the terms whereof were agreed between the parties except for the particular provision in cl 3 requiring service of notice of change of address of the parties which was inserted to accommodate Ho's proposal but was not accepted by him. Mr Murthi accepted that as at 24 June 1996, the unseen draft agreement existed, the terms whereof were agreed between the parties to the extent as Mr Yeo indicated. He maintained however that the faxed draft which was faxed to him by Max Yong of M/s Kiru & Yong differed from the unseen draft agreement in that the faxed araft incorporated Fam's proposed amendments. To that, Mr Yeo disagreed. The court below in its judgment at p 92 of the appeal record regarded or treated as a fact that the faxed draft was the unseen draft agreement which had been agreed on as at 24 June 1996 and that the faxed draft was the same draft which M/s Murthi & Partners enclosed in its letter dated 5 July 1996 to M/s RR Sethu for comparison.

From the nature of the second dispute, it must be plain and obvious to the parties as it was to me that the basic document to establish their respective cases was undoubtedly the unseen draft agreement. The burden of proof was on Ho to establish his case on a balance of probabilities that the faxed draft was not the same as the unseen draft agreement in that the faxed draft incorporated Fam's proposed amendments. Likewise, the burden of proof was on Fam to establish his case on the balance of probabilities that the faxed draft was the same as the unseen draft agreement. It was common ground that the unseen draft agreement existed in reality in

the form of a document which documented what was agreed upon between the parties up to 27 June 1996, the date of M/s RR Sethu's letter to M/s Murthi & Partners at p 123 of the appeal record, as a result of the 'without prejudice' negotiation. It was, therefore, a contemporary document. The faxed draft was faxed on 8 July 1996 and there was nothing to establish that it was or was not the facsimile of the unseen draft agreement. In the final analysis, that issue entailed a careful examination and comparison of the terms of the unseen draft agreement and the faxed draft to determine if they were exactly the same and a finding of fact by the court below that the faxed draft was or was not the facsimile of the unseen draft agreement. Unhappily, the unseen draft agreement was not included in the set of documents filed in the court below and consequently, not in the appeal record so that it was not possible for the court below or this court to examine the unseen draft agreement or to compare it with the faxed draft. At p 108 of the appeal record, Mr Yeo drew attention of the court below to the likeness of cl 3 of the faxed draft to the amended cl 3 proposed at p 121 of the appeal record and submitted that that was the reason for his conclusion that the faxed draft was the unseen draft agreement. In my view, the fact that they were as like as two peas in a pod was no basis for concluding that the entire faxed draft was the facsimile of the unseen draft agreement. The faxed draft contained 15 clauses in all, of which cl 3 was just one of them. The fact that cl 3 of the faxed draft was identical to the amended cl 3 proposed at p 121 was no reason whatever for presuming that the remaining clauses of the faxed draft must be identical with those of the unseen draft agreement and hence, the faxed draft was the facsimile of the unseen draft agreement. As the saying goes — one swallow does not make a summer. In short, whether each and every clause in the faxed draft was identical with that of the unseen draft agreement was an issue of fact to be determined by a comparison of the relevant clause in the faxed draft with the relevant clause in the unseen draft agreement. That would only be possible if the unseen draft agreement existed in reality and was included in the set of documents filed in the court below.

M/s RR Sethu in its letters dated 24 June 1996 and 27 June 1996 referred to the unseen draft agreement as the 'settlement agreement'. Likewise, M/s Murthi & Partners referred to it as 'the agreement' in its faxed letter dated 27 June 1996 and as 'the draft agreement' in its letter dated 5 July 1996. The title and preamble of the faxed draft showed that it was a deed of settlement although the testatum and testimonium therein were cast in the format of an agreement. Surely, there is difference in form between an instrument under seal in the case of a deed and an instrument by hand in the case of an agreement. The faxed draft was partly a deed and partly an agreement; it had the head of a deed and the body and tail of an agreement. From the desirability for a prompt settlement and the request for an early appointment to execute the settlement agreement in the concluding paragraph of M/s RR Sethu's letter dated 24 June 1996, it was not unreasonable or improbable to conclude that the settlement agreement must have been prepared and ready for execution by the parties as at 24 June 1996. In the light of my observations on the faxed draft, it was

obvious that whether as an instrument under seal (a deed) or by hand (an agreement), it was not ready for formal execution by the parties on 8 or 9 July 1996. From those observations, it seemed probable that either the faxed draft was not the facsimile of the unseen draft agreement at all or that it was the facsimile of the unseen draft agreement but that between 24 June 1996 and 8 July 1996, the unseen draft agreement itself was in the process of being transformed from an agreement by hand to a deed under seal and that as at 8 July 1996 such transformation was incomplete. If the faxed draft was the facsimile of the unseen draft agreement which Mr Yeo contended that it was, then it should take the form of an instrument by hand, an agreement as M/s RR Sethu consistently referred to it throughout its correspondences. If the faxed draft was not the facsimile of the unseen draft agreement which Mr Murthi contended that it was not, then the faxed draft was plainly not ready for formal execution by the parties. Mr Murthi further contended that the faxed draft incorporated Fam's proposed amendments, the outcome of which was that the faxed draft became Fam's offer. Specifically, what were those amendments in the faxed draft which Max Yong attributed to Fam in the telephone conversation on 8 July 1996 which Mr Murthi had with him? Nowhere in its letters before or after 9 July 1996 did M/s Murthi & Partners identify any one of them. Its letters dated 8 July 1996 and 9 July 1996 made no mention of any amendment or of the term 'offer' or named Fam. It referred to the faxed draft as the 'deed of settlement' and 'the terms contained therein'. For the first time in its letter dated 13 July 1996, in particular paras 4, 5 and 9, M/s Murthi & Partners mentioned the telephone conversation which Mr Murthi had with Max Yong on 8 July 1996 and 'some amendments' to the unseen draft agreement and that at Mr Murthi's suggestion, the faxed draft was faxed to him. By 'your client's offer of the second draft agreement' in para 5 of that letter, quite clearly, M/s Murthi & Partners meant Fam's offer of the faxed draft. But those amendments which were attributed to Fam were not identified in that or subsequent letters from M/s Murthi & Partners. It appeared from p 104 of the appeal record that those amendments were only identified at the hearing in chambers on 10 April 1997 as cll 7, 9, 15 and 8 of the faxed draft. From the events he recounted in para 4 of the letter dated 13 July 1996, it must be taken that Mr Murthi knew specifically what those amendments were on 8 July 1996 and 9 July 1996 when he wrote those letters and if it was M/s Murthi & Partners intention to call the faxed draft as Fam's offer as it turned out to be the case on 13 July 1996, surely 8 July 1996 and 9 July 1996 would have been the most suitable moment to say so in those letters of the same dates. At any rate, in the absence of the unseen draft agreement to compare, it was not possible to conclude whether those amendments were in fact amendments and if they were, whether they were Fam's amendments.

On the available evidence and for the reasons given in my view, neither Ho nor Fam had established their respective cases on the balance of probabilities. In short, without the unseen draft agreement made available to the court, it was impossible for the court to arrive at a finding of fact that

A the faxed draft was or was not an exact copy of the unseen draft agreement or that those amendments were or were not amendments and if they were, whether they were Fam's amendments.

Having regard to the penultimate paragraph of M/s RR Sethu's letter dated 2 July 1996 and to what it meant as earlier explained, the only
B possible inference of fact that could reasonably be drawn concerning the faxed draft together with the letters of 8 July 1996 and 9 July 1996 was that it was a follow up by M/s Murthi & Partners of that penultimate paragraph and, in that sense, an offer by M/s Murthi & Partners on Ho's behalf to M/s RR Sethu for Fam to settle on the terms of the faxed draft and no more. Fam did not accept Ho's offer and did not sign the faxed
C draft. He dissented; negotiations broke down on 22 July 1996 with M/s RR Sethu's letter of the same date. Thus, there was no contract binding on Ho or Fam.

For all these reasons stated, I decided that this appeal be dismissed with costs and the deposit to be paid towards the taxed costs and so it was
D ordered.

Appeal dismissed.

Reported by David Lai

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